APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, ENTERED AND FILED DECEMBER 17, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5939

D. C. Docket No. 95-8343-CV-KMM

GRAHAM C. FARIA,

Plaintiff-Appellant,

versus

TOWN OF PALM BEACH;
POLICE CHIEF, Joseph L. Terlizzese,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 17, 1998)

Before ANDERSON and DUBINA, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

Even considering only the facts known to the Town at the time of the decision, the judgment of the district court is due to be affirmed.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED AND FILED NOVEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case No. 95-8343-CIV-MOORE

GRAHAM C. FARIA,

Plaintiff,

vs.

TOWN OF PALM BEACH,
POLICE CHIEF JOSEPH L. TERLIZZESE,

Defendant.

ORDER

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (D.E. #43).

UPON CONSIDERATION of the motion, responses, materials submitted, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

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BACKGROUND[1]

The Plaintiff, Graham C. Faria ("Faria"), sues the Town of Palm Beach ("Palm Beach") for discrimination under the Americans With Disabilities Act.

Faria has insulin-dependent diabetes and consequently his body requires insulin to regulate his blood sugar levels. Faria applied for a job as a police officer with Palm Beach on February 1, 1994. Faria's application was processed by Palm Beach and he was given a physical agility test, writing test and he submitted for personal interviews. Palm Beach later informed Faria that he had successfully completed the first phase of the examination process and that his name was placed on the eligibility list for employment. Consequently, Palm Beach required Faria to undergo a background investigation, psychological examination and a medical examination.

In the course of the background investigation, Palm Beach obtained documents from Faria's employment at the Palm Beach County Sheriff's Office[2] ("PBSO") indicating that he had experienced hypoglycemic reactions while employed there and while attending the police academy. The number and severity of these attacks are in dispute by the parties.

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1. Unless otherwise noted, the following facts are undisputed.

2. Faria worked as a corrections officer for PBSO until April, 1995.

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Joseph Ojea, M.D. ("Dr. Ojea") conducted a physical examination of Faria. Dr. Ojea determined that Faria was not medically qualified for the position of police officer due to his history of hypoglycemic attacks. Dr. Ojea testified during deposition that Faria suffers from a condition known as "hypoglycemic unawareness" and that he falls into hypoglycemic attack quickly and without warning. Dr. Ojea believed that Faria posed a significant risk of substantial harm to himself and others which could not be safely accommodated. As a result, Faria was informed by Palm Beach that he did not qualify for police officer.[3]

It is undisputed that when Faria is not experiencing low blood sugar he is in excellent health. Faria passed all of the physical fitness tests required by Palm Beach. Faria testified that he has never called in sick because of his diabetes.

However, the record reflects numerous hypoglycemic attacks. Many of those occurred while Faria was working. The PBSO reports reveal that Faria suffered a hypoglycemic attack in 1992 while attending the police academy. The report

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3. Palm Beach notified Faria that he had been rejected for the Police Officer position, stating:

> This is to inform you that you will not receive a final offer of employment because you cannot perform the essential functions of the position of Police Officer in the Town of Palm Beach. Your medical examination reveals that you are susceptible to physical symptoms that can appear without warning, which pose a significant risk of harm to yourself and others and which cannot be safely accommodated.

of the 1992 incident described Faria as sweating, disoriented, unable to support himself and unable to stay awake without being prodded. Tracy Gonzalez, a co-worker who witnessed this incident, described Faria as having difficulty staying awake, glassy eyed, disoriented, and unable to communicate.

The reports also document a 1994 disabling hypoglycemic seizure in the central control room at the county jail. During this incident, Faria is described as incoherent and oblivious to his surroundings. In the report of the 1994 incident Faria's supervisor wrote that this incident is not the first. He noted that this is the fourth or fifth time that Faria has had a hypoglycemic seizure. The report specifically refers to a similar incident occurring in another control room about a year and a half before the 1994 incident. Lt. Schime, a witness to the above-mentioned 1994 attack, described Faria as disoriented, swinging his arms as if he was in slow motion, glassy-eyed and unresponsive. Lt. Schime testified that Faria locked himself in the control room and it took perhaps five minutes before they could talk him into pushing the button to open the door.

Hospital records from the Martha's Vineyard, where Faria has lived since May, 1995, document at least five disabling hypoglycemic attacks. During one of these attacks, an EMT described Faria as rigid, combative and unresponsive to verbal commands. The EMT added that Faria spit out an attempt to administer glucose by mouth and that he had to be restrained and handcuffed to a body board. Additionally, the EMT testified during deposition that Faria, before being restrained, had moved wildly throughout his apartment and in an aggressive manner toward persons in his proximity.

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During one of these attacks in March 8, 1997, the EMT found Faria unresponsive to verbal commands. The report noted that Faria had been combative when his mother attempted to give him glucose. On March 22, 1997, Faria's mother is reported to have found him lying on his bed having a hypoglycemic attack. The EMT described Faria as combative and confused. The EMT documented a two-inch laceration on the back of his head resulting from a blow from the head board of the bed. Also during this incident, Faria bit his tongue.

On June 5, 1997, a hospital report described Faria as disoriented and tremulous while working for the Oak Bluffs Police Department directing traffic. The paramedic described Faria as disoriented and unable to answer questions. He was transported to the hospital. On July 27, 1997, Faria was again described by an EMT as unresponsive and combative. During this episode, Faria again spit out an attempted administration of glucose by the mouth.

Additionally, medical records from the Bethesda Memorial Hospital in Boynton Beach, Florida reveal that Faria experienced at least three disabling hypoglycemic attacks between June, 1992 and January, 1993. The records indicate that Faria was discovered unresponsive and taken to the emergency room all three times.

Additionally, Lt. Schime witnessed an unreported hypoglycemic attack where Faria was disoriented and combative. During this incident Faria scuffled with a fellow officer and had to be restrained by several police officers before the nurse could administer glucose. This incident occurred about a month before Faria left PBSO.

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DISCUSSION

I. Summary Judgment Standard

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56c of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment may be entered only where there is *no* genuine issue of material fact. *See Twiss v. Kury*, 25 F.3d 1551 (11th Cir. 1994). The moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Id.* However, the non-moving party:

> [m]ay not rest upon the mere allegations and denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed.R.Civ.P. 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. *Anderson*, 477 U.S. at 254. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. *Id.* at 254-55.

Additionally, the non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *Id.*

II. Legal Analysis of the ADA Claim

Faria claims that Palm Beach discriminated against him by denying him employment as a police officer because he is an insulin-dependent diabetic. Section 1 of the Americans

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With Disabilities Act ("ADA") prohibits a "covered" employer from discriminating against a qualified disabled person with respect to "the hiring, advancement or discharge of employees, and employee compensation, job training, and other terms conditions, and privileges of employment." 42 U.S.C. §12112(a).

In order to establish a *prima facie* case of discrimination under the ADA, Faria must prove that: (1) he has a disability; (2) he is a qualified individual; and (3) he was discriminated against because of his disability. See 42 U.S.C. § 12132.

III. Disability

The Court will examine whether Faria has a disability as defined by the ADA. The ADA defines a "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment. *Id.* § 12102(2). It is undisputed that Faria's diabetic condition is an impairment with respect to the ADA. The issue presented here is whether the impairment is also a disability. Does Faria's insulin-dependent diabetes "substantially limit" one of his "major life activities?"

Palm Beach argues that none of Faria's major life activities are "substantially limited."[4] Specifically, they argue that Faria's ability to work has not been "substantially

4. Palm Beach notes Faria's deposition testimony where he states that his diabetes does not limit any of his everyday activities. (Faria depo. pp. 240-41)

limited." An impairment "substantially limits" the major life activity of working, when the impaired is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as to compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job, does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 912 (11th Cir. 1996). In other words, Palm Beach claims that to establish a disability because one's ability to work is substantially limited, an impairment must limit employment generally.

However, in *Harris v. H & W Contracting Co.*, the Eleventh Circuit looked to the appendix to the Code of Federal Regulations. 102 F.3d 516, 520-21 (11th Cir. 1997). The appendix states "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. app. § 1630.2(j) (1996). In fact the appendix specifically refers to diabetics. "[A] diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication." *Id.*

According to *Harris*, Faria has a disability. Although he may not be substantially limited with respect to major life activities, including work, with medication, without medication he certainly would be. Therefore, Faria has satisfied the first element of the *prima facie* case of discrimination under the ADA. Under the ADA's definition, Faria has a disability.

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IV. Qualified Individual

Next, the Court examines whether Faria is a qualified individual under the ADA. The ADA provides that an employer may not "discriminate against a qualified individual with a disability because of the disability . . . ." 42 U.S.C. § 12112(a). A qualified individual is a person who is able to perform the essential functions of the job with or without reasonable accommodation. 29 C.F.R. § 1630.2(m).

However, an employer need not employ a disabled person if he possesses a direct threat to the health or safety of himself or others. 42 U.S.C. § 12111(3). There is no direct threat defense, though, if the employer could have made "reasonable accommodation[s]." 42 U.S.C. 12113(a). A direct threat is a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodations or more specifically by modification of policies, practices or procedures or by the provision of auxiliary aids or services. 42 U.S.C. 12111(9); 29 C.F.R. § 1630.2(o)(2). The employee retains at all times the burden of showing that he was not a direct threat or that reasonable accommodation was available to eliminate the threat. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 446 (1996).

Here, Palm Beach admits that it did not hire Faria because he was diabetic. Therefore, the issues are whether Faria produced enough evidence from which a reasonable jury could conclude (1) that he was not a direct threat or (2) that reasonable accommodations were available. *Moses*, 97 F.3d at 447.

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To defeat a motion for summary judgment, the nonmoving party must raise "significant probative evidence" that is "sufficient" for the jury "to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Faria has not met this standard. Faria has suffered numerous hypoglycemic attacks. The record indicates ten documented hypoglycemic incidents in the last six years. Many more are alleged. Additionally, the record clearly indicates that not only is Faria disoriented during these hypoglycemic attacks, but he can be combative. Faria offers no evidence countering the evidence that he can be combative and aggressive during these diabetic attacks.

The only evidence Faria produces to prove he is not a direct threat is his affidavit stating that during the reported hypoglycemic attacks occurring at PBSO, no one was injured. However, one of the hospital reports from Martha's Vineyard reveals that during one of Faria's hypoglycemic attacks he badly cut the back of his head and lacerated his tongue with a bite. Additionally, the claim that no one has been hurt in the past is not "significant" evidence that no one will be injured in the future.

Faria states in his affidavit that if reasonably accommodated he could perform his duties as a police officer. However, no reasonable accommodations exist that would eliminate the threat of future attacks. These attacks sometimes take place without warning as evidenced by the fact that Faria has suffered numerous attacks at his home where he can accommodate himself in whatever manner he chooses. Additionally, Faria's previous employers have not prevented him from accommodating himself in the manner he needs to

prevent these attacks, yet the attacks have still occurred. Faria has been able to carry the snacks, glucose tablets, and blood testing kit that he needs.

Faria's affidavit states that three of the hypoglycemic attacks occurred because he was not accommodated. The alleged lack of accommodation occurred when Faria requested relief from a coworker so that he could nourish himself in order to prevent hypoglycemic attack. The relief arrived late. However, as a police officer, consistently involved in dangerous and stressful situations, relief to nourish oneself is not always available. It is not reasonable to suggest that Palm Beach must have relief quickly available at all times to accommodate Faria.

Faria has not satisfied the second element of the *prima facie* case. No genuine issues of material fact exist with respect to whether Faria is a qualified individual under the ADA. Therefore, Palm Beach is entitled to a judgment as a matter of law.[5]

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that the Motion be, and the same is hereby, GRANTED.

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5. Faria must satisfy all three elements of the *prima facie* case to support a claim of discrimination under the ADA. He has not met his burden with respect to the second element. Therefore, the Court does not address the third element of the claim.

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DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of November, 1997.

s/ K. Michael Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

CC: John S. Trimper, Esq.
George Arthur Lane, Esq.